IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 428 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

@

LAKHUBHA PATUBHA

Versus

DEVKUNVARBEN BHURUBHA WD/O BHURUBHA PATUBHA

Appearance:

MR JT TRIVEDI for Petitioner No. 1

RULE SERVED for Respondent No. 1-2

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 05/09/2002

ORAL JUDGEMENT

Heard Mr. J.T. Trivedi, ld. advocate appearing for the applicant-revisionist. Nobody appears on behalf of the respondents, though the Rule was served on the respondents.

2. The present Civil Revision Application is filed against the order passed by the learned Civil Judge (JD), Talaja below application Exh. 18 in Regular Darkhast No. 21 of 1997 on 20th March 2001 whereby the learned Judge has allowed the said application and the present

applicant-revisionist was ordered to be detained in civil prison for 7 days for contempt of court, in case of failure to pay Rs. 7,200/= within one month from the date of the said order and also to pay penalty of Rs. 2,000/= and costs of Rs. 200/=.

3. Mr. Trivedi, ld. advocate appearing for the applicant has submitted that the order passed by the learned Judge is without jurisdiction and the court below is not competent to award sentence while exercising the power of contempt. He has further submitted that the contempt power can be exercised only by the High Court and since the present order is without jurisdiction the same deserves to be quashed and set aside. It has been further argued by Mr. Trivedi that the present applicant is the brother of husband, i.e., brother-in-law of the respondent No.1 and hence the petitioner could not be arraigned for contempt. It is further submitted that the execution proceedings by way of Darkhast No. 2/92 was dismissed and an appeal bearing No. 27/2000 is pending before the Assistant Judge, Bhavnagar. Thereafter another application was preferred which was not maintainable as it was barred by res judicata. It has been further submitted that the petitioner is of 95 years old and he has no source of income nor any means to comply with the order and in such a situation the order of sentence passed against him is absolutely unjustified and improper and is required to be quashed and set aside.

4. The submissions which are made before me are more or less the same which were made before the learned Judge and yet the learned Judge has passed the impugned order. While passing the said order, the learned Judge had relied on the decision of this Court in the case of Lopaben Patel vs. Hitendra Rambhai Patel, 1999 (2) GLH 203, wherein this Court has observed as under :

> "Despite the orders of this Court, the respondent-husband has not cared to pay the maintenance pendente lite, and is before us raising the technical contentions and as a last resort, his inability to pay the amount in question on the basis of his feeble financial position. Needless it is to be emphasized that his contention regarding his feeble financial position has not been accepted by this Court, but on the contrary, there has been an upward modification in the maintenance amount, both for the wife and the daughter. The nonpayment of the amount in question, in our opinion, not only

amounts to the contempt but the contempt in our opinion is of such a nature, that it substantially interferes with the due course of justice...."

While applying the ratio of the aforesaid judgment, the learned Judge has completely ignored the fact that contempt power was exercised by this Court and in that context, the above observations were made. By applying the said principles the learned Judge himself should not have exercised the contempt powers.

5. It is true that Order 29 Rule 37 confers power on the Court to issue warrant for detention of judgment-debtor. But before exercising the power the Court is required to give an opportunity of being heard to the judgment-debtor by issuing notice to show cause as to why he should not be committed to civil prison. The notice may be dispensed with only if the Court is satisfied, by affidavit or otherwise, that with the object of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court. This issue was raised in the case of Koli Lambhabhai Bhanabhai & Anr. vs. Shukla Harilal Narmadashanker, 1990 (1) 31 GLR 50, wherein this Court has held as under :

"Section 51 deals with power of Court to enforce execution of decree. One of the modes provides is by arrest and detention in prison for such period not exceeding the period specified in Sec. 58 where arrest and detention is permissible under the provisions of Sec. 58. Other modes of enforcement of execution of decree provided for are by delivery of any property specifically decreed; by attachment and sale or by sale without attachment of any property; by appointing a receiver; or in such other manner as the nature of the relief granted may require. Proviso to Sec. 51 is important. The proviso enjoins duty upon the Court to afford an opportunity of being heard to the judgment-debtor to show cause as to why he should not be committed to prison and the Court is also required to be satisfied on certain aspects which are mentioned in the proviso."

This Court has further observed that, "It is evident that nowhere the trial Court has found that the judgment-debtors have sufficient means to satisfy the

decree, but they have adopted recalcitrant attitude and are bent upon opposing the execution of the decree deliberately; that they are sufficiently rich to satisfy the decree fully or atleast substantial part of it and even so they are deliberately avoiding execution thereof; that they have no other pressing needs on their resources and despite there being sufficient extra means and resources with them after satisfying their pressing needs, they are adopting delaying tactics to avoid execution of decree."

Here, in the present case also, it is averred in the petition as well as it is submitted before the trial Court that the petitioner is 95 years old and is not having any sufficient means to satisfy the decree. The said fact was not controverted by the other side or no evidence was led against this effect and in such a situation even if the learned Judge intends to exercise his powers under Order 21 Rule 37 the same can be done only on the basis of proper evidence in the matter. Since it was not done and since the contempt powers were exercised by the learned Judge himself which is not permissible, the impugned order passed by him is without jurisdiction and dehors of any merits or substance.

6. In view of the above facts, I am of the view that though the learned trial Judge is justified in passing the order to the effect that the amount of Rs. 7,200/= should be paid within one month from the date of that order, he is not justified to pass an order holding that in case the applicant fails to pay the said amount within one month he will have to undergo sentence of seven days and he will have to pay fine of Rs. 2,000/=. I, therefore, quash and set aside the order with regard to detention of the petitioner in civil prison for seven (7) days and fine of Rs. 2,000/= with the observation that power under Order 21 Rule 37 cannot be exercised arbitrarily and without following the due procedure of law and without satisfying the conditions mentioned therein. It is, however, made clear that this does not absolve the petitioner from his liability to pay Rs. 7,200/= as ordered by the learned Judge. This does not preclude the learned trial Judge from examining the present respondent/original decreeholder's application under Order 21, Rule 37 of the Civil Procedure Code. It is also open for the present respondent/original decreeholder to applyto this Court for contempt of court for the alleged non-compliance of the Court's order.

7. With the above observations, the present Civil Revision Application is allowed to the above extent and

Rule is made absolute with no order as to costs. Direct service is permitted.

rmr. [K.A. Puj, J.]